

SENATE HAS FULL POWER TO EXCLUDE APOSTOLIC SENATOR

This is Clearly Shown in Able Argument By Senator Berry of Arkansas in His Speech on the Smoot Case

SIMPLE MAJORITY SUFFICIENT TO DECLARE SEAT HE HOLDS VACANT

No Man Who is Upholder of Lawbreaking Church Leaders Has Right to Place Among Lawmakers

"The questions in this case, and they are vital, are—Smoot being a high official, with great power in the Mormon church, whether or not the fact that the church had notoriously violated the laws; whether or not his association amongst the presidency and the twelve apostles from day to day, his voting to sustain the president, who admitted and confessed before the committee that he had been violating the law many years after Utah was admitted into the Union—I say, Mr. President, the question is whether or not such facts should operate to prevent him from holding his seat in the Senate.

"Another question is, whether or not any church under any name, I care not what, can assume a power and authority to violate the law and defy the Government of the United States, or any State of this Union, and yet try to shelter themselves behind the constitutional privileges which guarantee religious liberty."—Senator Berry of Arkansas, on the Smoot case.

WASHINGTON, Feb. 11.—Senator H. Berry of Arkansas, a one-time Confederate veteran, made an able speech in the United States senate today in opposition to Reed Smoot.

It was well tempered and is generally regarded by Senators as one of the strongest arguments yet made in favor of the right to exclude by a majority vote.

"I wish to say in the beginning," said Senator Berry, "that in what I say today I have no personal feeling whatever of unkindness toward the senator from Utah. I have served on committees with him for some four years, the relations between us have always been pleasant."

Mr. Berry declared that politics should not enter into the consideration of the question and did not, so far as he himself, was concerned.

"I say this more readily because seven years ago when the question was pending in the other House with reference to the seat of Brigham Young, while he was a Democrat, I did not to numerous members of the House that I thought the proper practice was first to swear him in and then he was sworn the case should be referred to a committee, and if that committee found the facts as stated they ought to declare that he was not qualified to sit in the House."

Mr. Berry also disavowed any desire to prejudice the case on religious grounds.

Reference to Massacre.
The senator made a veiled reference to the Mountain Meadows massacre when he observed:

"I would have contented myself with simply casting my vote had it not been for certain occurrences which took place years ago that peculiarly and specially affected the people of the state in which I live, and therefore would an interest there that probably does not exist in many other localities throughout the Nation."

The senator took up the matter of the Senate's right to exclude rather than expel.

"I have been told that certain Senators on this side" (indicating his Democratic colleagues) "hold the view that while we have the unquestioned power and the right in this particular case, based upon this testimony, to exclude the senator from Utah, we have no right to pass the resolution reported by the committee, which simply excludes him."

Has Right to Exclude.
So far as I have been able to ascertain, there is no case, either in this House or the other, where any Senator has ever been expelled for an act which occurred prior to the time when he was elected. It is laid down by the text-writers, so far as I am able to read them, that the Senate has no right to expel a member,

except it be for some act after he is elected to the office or some wrongful act which occurred in connection with that election. So far as the proper actions in this case, they show the Senator from Utah is not entitled to a seat on this floor."

Mr. Berry said the power to expel was unlimited, but not more so than the other constitutional provision which made each house of Congress a judge of the election returns and qualifications of its members.

Mr. Berry referred to the case of Whittemore, a member of Congress from South Carolina. A committee of the House found he had sold a cadetship. He resigned, and the committee reported that, he having resigned, the House had no power to expel him, and simply passed a resolution of censure.

Whittemore returned to his State and was re-elected, and when he presented his credentials the question of his fitness arose. Gen. John A. Logan led the fight against him. Mr. Berry quoted from Gen. Logan as follows:

"It is said that the constitution had the right to elect such a member as they may think proper. I say no. We cannot say that he shall be of a certain politics or of a certain religion, or anything of that kind; but, sir, we have the right to say that he shall not be a man of infamous character." Whittemore was unseated.

Another Case Cited.
The Arkansas Senator cited the case of Thomas, of Maryland, who was refused a seat in the Senate, "not by expulsion, but on the ground that he had committed acts prior to the time of his election which disqualified him as a senator."

"But we are confronted with the proposition that we cannot add—the way it is usually put I believe—that we cannot add any qualifications to those which are laid down in the Constitution."

Mr. Hopkins, of Illinois, who made a speech defending Smoot some days ago, interrupted to inquire: "As I understand the Senator's position, it is that in the case of Smoot, in order to adopt the resolutions now pending, it would require a two-thirds vote."

Mr. Berry replied that the believed just the contrary, saying: "I have taken the position that we can adopt the resolution, and it takes only a majority vote to determine the qualifications of any Senator."

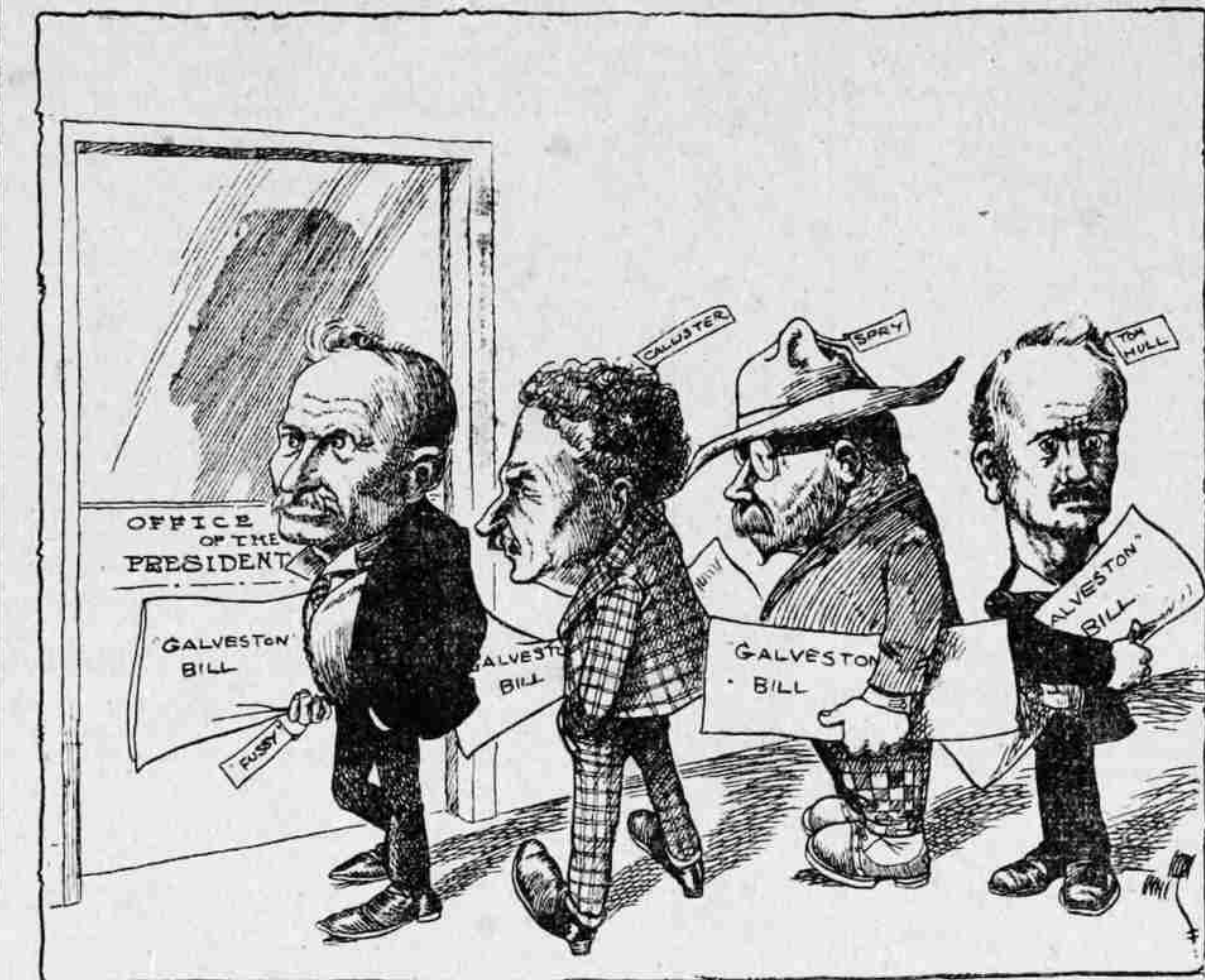
Continuing Mr. Berry said:

"I want to say that, in my judgment, there are no qualifications specified in the Constitution of the United States, but there are certain disqualifications named in the instrument. The framers of the Constitution did not undertake to lay down all the objections that might be raised."

Mr. Berry read from the debates on the Constitution to show that the Constitution did not enumerate all possible disqualifications.

"Aha we bound to admit a man to a

THERE ARE THEY, A-WAITIN' AT THE CHURCH!



"Shall the Bill Pass, Mr. President?"

seat in this body who is a confessed felon and may be fresh from the penitentiary of his State, it may be unpardonable and disqualified to even vote in the State in which he lives and yet must we say that he is entitled to occupy a seat in this body unless he is expelled by a two-thirds majority?

"Take, for instance, the case of an insane man. If such a person should be sent here, will any Senator tell me that the proper method would be to expel him from this body for no wrongful act of his own, but simply because of his misfortune? The Senate undoubtedly has the right to protect itself against criminals or against those who would disturb or interfere with its proceedings and would anyone contend the expulsion would be the proper method of procedure as to a man who exhibited symptoms of insanity?"

Senator Hopkins continued to question Mr. Berry, but the latter proved well qualified to take care of himself. Hopkins' questions were directed chiefly to show that Smoot, having been sworn in, could not now be put out except by expulsion. He tried to rely on the procedure in the Roberts case, but Mr. Burrows finally asked permission to interrupt and said:

Oath Does Not Cure Defect.
"It has been decided by the Senate in contested election cases over and over again that the fact that a Senator has been sworn does not cure any defect in his qualifications. In that case of Roberts he was not permitted to take oath, as I remember, but Senator Bailey stated in the committee that if the Senate should find the Senator from Utah was disqualified for any reason, the disqualification could be enforced after the oath is taken as well as before."

Referring to Joseph Smith, Mr. Berry said:

"He is all-powerful in that church. I think the Senator from Utah himself has testified that the twelve apostles, of which he is one, only have advisory power. And yet, after the Mormons had solemnly agreed in the Constitution of the State, after they had been admitted into the Union upon that solemn pledge, the president of the church tells the committee, openly and defiantly, that he has violated the law; that it was his religious duty, and he would take his chances with the law."

Church Remains the Same.
Mr. Berry quoted freely from Senator Smoot's testimony to show that the rules of the church were practically the same today as when they were handed down by Brigham Young.

"The Senator from Utah says that if he himself should receive a revelation which was in conflict with the oath that he had taken here and his duty as a Senator, he would leave the United States before he would obey his oath and obey the Constitution."

Speaking as an ex-Confederate, Senator Berry said:

"We never pledged fidelity to this Union and then sought by indirection to violate it from day to day. When our chief laid down his arms at Appomattox he promised for our future peace and submission to the laws. We have kept the pledge. I do not think you will find a Southern Senator who, if called before a committee and asked the question what he would do if he had to choose between any church and any other governing body and his oath and the Constitution who would not answer at once that he would stand by his oath and the Constitution. I do not think one of them would seek to leave the country in order to evade doing that which we swore we would do when we came here as Senators."

Sustained Polygamists.
The Arkansas Senator said that Smoot had associated with and voted to sustain polygamists. He referred to the stubborn contention for polygamy

by Joseph Smith before the Senate committee.

"The whole history of the church from its inception through its entire pathway has been strewn with the wrecks of violated laws, of outraged justice."

The Senator then reviewed the facts of the Mountain Meadows massacre. After picturing the effect which a vote seating Smoot would have on the future preaching of polygamy by Joseph Smith and his laborers, the Senator concluded as follows:

"If, on the other hand, a majority of the Senate shall show that no man representing a church of that character ought to sit in this chamber, then in 10,000 homes in every State in this Union the mothers, wives and daughters will gather around the bedside and thank God that the Senate of the United States has put its everlasting seal of condemnation, not only upon polygamy, but upon every organization that seeks to set itself up above the Constitution of the United States, of the States of this Union and the laws which we have all sworn to obey."

MANY WANT THE PLACE
Question of Filling Vacancy on Idaho's Federal Bench Is Pending.

WASHINGTON, Feb. 11.—The question of filling the vacancy on the United States District bench for Idaho is occupying the attention of Idaho Republicans to the exclusion of about everything else. Barney O'Neill and Wallace is here, John Gray of Wallace is expected tomorrow. Senator Heyburn favors Judge Aikins of the Idaho Supreme Court. He is trying to bring about an agreement with Senator Borah, who will be here in a few days, to recommend the nomination of Judge F. S. Deitch of Pocatello, attorney for the Oregon Short Line; Babb of Lewiston, C. L. Heitman of Kootenai and Fremont Wood of Ada.

Entries at Emeryville.
Special to The Tribune.

OAKLAND, Feb. 11.—Following are the entries for Tuesday's races at Emeryville: First race, four furlongs, selling—Memorize, Amada, Charlotte E., Adena, Alta Rose (b. f., Alamax-Sweet Rose), Rio Vista, Chenoweth, Grace Marie (br. f., sire, Hampton-Lime Kiln), Lurana (br. c., Wheeler-Krunk), 112; Bathurst, 109; Gladstone, 107.
Second race, five furlongs, selling—Mimo, Joe Goes, Box Elder, Adirondack, The Missourian, Eduardo, 124; Galtee, George P., McNear, 122; Degmont, Nip's Valley, North, Hicks, 119; Water Thrush, Grigitt, 111; Sheen, 117.
Third race, mile and a furlong, selling—Arc, Nutek Prince, Eyndeale, Daniel C., Col. Jewell, Alma Boy, 119; Lone Wolf, Inflammable, Watercure, Monioa, Mald, 107; Early House, 109; Rushmore, 91.
Fourth race, handicap, selling—Tocalaw, 112; Cloudlight, 108; Delagoo, 105; Blong, 102; Martinus, 101.
Fifth race, mile and a half, selling—Buckeye, 106; Edna, 104; Dan, 103; W. B. Gates, 102; The Only Way, 100; Capt. Burnett, 97; Bogum, 94; Peligro, 88.
Sixth race, eleven-sixteenths of a mile—St. Elmwood, Al Lindsay, Woodslands, 124; Varbo, 108; Mike, Goldhearer, Ray Bennett, Arcourt, Big Bend, Kokomo, 104; Burning Bush, 105.
Seventh race, seven furlongs, selling—Margaret M., Lisleas, Bertha E., Molly Donahue, Lady Carol, Orline, Miss Leads, French Nun, Poole, Eva Green, Field Luck, Merry Belle, 99; Donna, 104.
Fourth race, Theres handicap, mile and an eighth—Ting, Devore, 96; Pat Sterling, 100; Lady Havarre, 115; Alma DuFour, 117.
Fifth race, mile—Obvessa, Flaxgony, 95; Riekey, Grevalia, Cobmosa, Tornus, 100; Delphie, Grey Plume, Silver Skin, King of the Valley, 103; Rather Royal, Dr. Sprill, Pasadena, The Englishman, Domino, 105.
Sixth race, five furlongs—Grace George, Impulsion, Butter Miss, Martha, Calomine, Spion, 87; Arno, Colness, Bud Hill, 89; Bonari, 92; Nutwood, 101; Redwina, Arby Van, 102; Major Johnson, Gentian, 101.

City Park Entries.
Special to The Tribune.

NEW ORLEANS, Feb. 11.—Following are the entries announced for Tuesday at City Park:
First race, three and a half furlongs—Buckeye, 106; Edna, 104; Dan, 103; W. B. Gates, 102; The Only Way, 100; Capt. Burnett, 97; Bogum, 94; Peligro, 88.
Second race, five furlongs, selling—Margaret M., Lisleas, Bertha E., Molly Donahue, Lady Carol, Orline, Miss Leads, French Nun, Poole, Eva Green, Field Luck, Merry Belle, 99; Donna, 104.
Fourth race, Theres handicap, mile and an eighth—Ting, Devore, 96; Pat Sterling, 100; Lady Havarre, 115; Alma DuFour, 117.
Fifth race, mile—Obvessa, Flaxgony, 95; Riekey, Grevalia, Cobmosa, Tornus, 100; Delphie, Grey Plume, Silver Skin, King of the Valley, 103; Rather Royal, Dr. Sprill, Pasadena, The Englishman, Domino, 105.
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NOT SMOOTH SAILING FOR TEST OATH BILL

Insurgents and Democrats Will Insist on Following Provisions of Constitution.

BOISE, Ida., Feb. 11.—Senator McCutcheon's test oath bill, which was not drafted exactly in accordance with the provisions of the constitution, is not having as clear sailing in the House as it had in the Senate. At present the Mormons and the allies are not having things their own way in the lower branch. The Insurgents and the Democrats have mutual interests and are working together for the common good. They are disposed to have the test bill conform to the provisions of the constitution and that is the way a majority of the judiciary committee looked at the matter, making a report to that effect in the House today.

McCutcheon bill omits all reference to patriarchal and ecclesiastical marriage and makes some changes in the manner of challenging voters. The committee holds that any deviation from the Constitution in drafting a bill would make the measure unconstitutional and would not meet the needs of the State.

The McCutcheon bill will be amended as suggested by the committee, and pass the House, but it is safe to say that it will meet defeat in the Senate, as the Mormons and their friends seem to be running things in that branch.

Child Labor Bill Modified.
The original child labor bill by McCracken was withdrawn, and the judiciary committee presented a substitute therefor not so sweeping in its character as the first one. The substitute will meet with little or no opposition in either House.

Representative Clark, who has been seriously ill at a local hospital, was again in his seat this morning. Wyman introduced a bill in the House providing for a statue of the late Senator George L. Shoup of marble or bronze to be placed in the hall of the House of Representatives at Washington.

Shaw's bill limiting the amount for which a surety company may become surety, passed the House.

Resolutions of sympathy with Representative West, of Cassia county, in the loss of his wife, who died Saturday, were offered by Frechaser and Mulhally and unanimously adopted. The House then adjourned till tomorrow out of respect for the deceased and her bereaved husband, and attended the funeral in a body, as did the Senate.

In the Senate a resolution was introduced by Pence, providing for an investigation of the accounts of the State Veterinarian and live stock sanitary board. It is said that the affairs of this department are badly mixed and the resolution calls for a committee of three to look into matters relative thereto. Tonight an open meeting is being held in the Senate chamber for the purpose of discussing the house anti-trust bill by Wyman. A large number of citizens are present, and an animated discussion is being had. This is one of the measures that the Insurgent Republicans and Democrats of the House entered into a compact to support and the Senate's action is awaited with much interest.

Agitation is going on here looking to the passage of an ordinance by the city council to keep boys out of pool rooms.

Sudden Fire in Street Car.
SAN FRANCISCO, Feb. 11.—An electric car on the Sutter street line caught fire without warning at the corner of Sutter and Polk streets shortly before noon today while crowded with passengers. A number of people were injured, but none seriously. The entire top of the car was burned off. It is supposed the fire originated from an exploding fuse.

ALIENIST SWEARS THAW DID NOT KNOW ACT WAS WRONG

Superintendent of New York State Hospital for the Insane Answers Hypothetical Question Covering all Evidence Now in.

DAY IS ONE OF FIERCE LEGAL BATTLES BETWEEN ATTORNEYS JEROME AND DELMAS

Defense Gains One Point By Forcing Introduction of Mrs. Thaw's Note, Terming White "That Blackguard"

NEW YORK, Feb. 11.—Answering a hypothetical question covering every detail of the testimony up to this time in the Thaw trial, including Mrs. Evelyn Nesbit Thaw's narration of her life history, Dr. Charles G. Wagner, superintendent of the State Hospital for the Insane at Binghamton, N. Y., declared on the witness stand today that in his opinion Harry K. Thaw did not know that his act was wrong when he shot and killed Stanford White. Dr. Wagner stepped aside for later cross-examination by District Attorney Jerome, and as court adjourned for the day it was announced that the defense would offer testimony from other alienists tomorrow morning.

Dr. Wagner's opinion of a hypothetical question, the man under consideration being the author of letters which have been introduced as emanating from Harry Thaw during his estrangement with Evelyn Nesbit after their return from Europe in 1903, furnished a day of legal sparring between Delphin M. Delmas of the defense and Mr. Jerome for the prosecution.

Mr. Jerome effectively blocked the completion for the time being of the testimony of Mrs. Evelyn Thaw by insisting that before she should go further competent testimony as to Thaw's unsoundness of mind should be given. Mr. Delmas tried to carry forward the young wife's story, but the District Attorney was on his feet with an objection to every question.

Mrs. Thaw had been recalled as the third witness of the day. One of her predecessors was J. D. Lyon, vice-president of the Union National bank of Pittsburg, who stated that he had received Harry Thaw's will from the latter's own hands some time prior to April 1, 1906, and had held it in a safe deposit box until late in November last, when he directed his secretary to forward it to John B. Gleason of Thaw's counsel. Mr. Gleason then swore that he had received the will by mail, December 11, 1906, and that absolutely no changes had been made in the instrument while in his possession. Mr. Jerome admitted the progress of the will from Mr. Lyon to Mr. Gleason without the necessity of calling the former's secretary. Mr. Delmas did not offer the will in evidence, however, owing to the fact that it has not in its entirety been proved as having been legally executed by Thaw.

Jerome Gives Up the Note.

When young Mrs. Thaw was called to the stand she was dressed precisely as when she occupied the witness chair last week. As she was taking her seat Harry Thaw did not know because of defective reason, that his act in killing Stanford White was wrong. When the expert is taken in hand by Mr. Jerome, he will have to give detailed reasons for his opinion. Dr. Evans of the New Jersey State Hospital for the insane will be the first witness for the defense tomorrow.

A new rule by Justice Fitzgerald, barring from the courtroom all women not engaged in active newspaper work, went into effect today. Many of those who, bedecked in gay costumes, had occupied front seats heretofore, were on hand early this morning, but to no avail. The court officers had direct orders this time and obeyed them. As a result there were many empty benches in the courtroom all day.

Women Spectators Barred.
The opening of the fourth week of the Thaw trial today brought a new order of things in the courtroom. All women other than the half-dozen active newspaper writers who have followed the case since the beginning, were barred by order of Justice Fitzgerald.

During the two days of last week, when Evelyn Nesbit Thaw was upon the witness stand, many women crowded the courtroom, having in some manner

every question with sustained objections.

Jerome Blocks Defense.
After compelling the defense to begin expert testimony to Mrs. Thaw's insanity by his objections, Mr. Jerome next proceeded to block the testimony of Dr. Wagner as to the results of his six visits to the defendant in the Tombs and his tests as to the latter's mental condition. Dr. Wagner was not allowed to go into the conversation he had had with the defendant, nor the conclusions he had reached from these conversations. He was confined to what he actually observed, and he declared his observations were so closely interlarded with his questioning of the defendant that he did not know whether he could separate them.

A long argument over the point resulted in Mr. Delmas withdrawing any further questions as to the tests, contenting himself with asking Dr. Wagner to give his opinion of the hypothetical question covering the evidence in the case. The question was almost record-breaking in length, a comprehensive resume of the entire case, including Mrs. Thaw's personal narrative.

Had to Amend Question.

In it Mr. Delmas accused Stanford White of having "drugged" Miss Nesbit, and of having attempted to renew "communication or relations" with her subsequent to her marriage. Mr. Jerome objected to these features, and it was amended to embrace the evidence of record as to the disputed points. It was on the amended question that Mr. Wagner gave it as his opinion that Harry Thaw did not know because of defective reason, that his act in killing Stanford White was wrong. When the expert is taken in hand by Mr. Jerome, he will have to give detailed reasons for his opinion. Dr. Evans of the New Jersey State Hospital for the insane will be the first witness for the defense tomorrow.

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